No. 13129

United States Court of Appeals
For the Ninth Circuit

M. C. SCHAEFER, *Appellant*,

vs.

SAM MACRI, DON MACRI, W. R. McKELVY and CONTINENTAL CASUALTY COMPANY, a Corporation, *Appellees.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLEE CONTINENTAL CASUALTY COMPANY

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JURISDICTION

Jurisdiction in the District Court was based on the facts alleged in Paragraph I of the Second Amended Complaint (Tr. 367-8) and upon 28 U.S.C. § 1332.

The District Court, having entered an Order dismissing the Second Amended Complaint with prejudice and without leave to amend, jurisdiction in the Court of Appeals is based on 28 U.S.C. § 1291, 1294.

STATEMENT OF THE CASE

1. Does Appellant's Second Amended Complaint state a cause of action against the Appellee, Continental Casualty Company, which is not barred by the applicable statute of limitations in the State of Washington?

2. Can Appellant state any cause of action?

3. If so, do the pleadings conform to Rule 8 of the Rules of Civil Procedure for the United States District Courts so as to withstand a Motion to Dismiss?

ARGUMENT

Summary

It is this Appellee's contention that the Second Amended Complaint does not state a cause of action against the Appellee, Continental Casualty Company; that if a cause of action is stated, it is barred by the applicable statute of limitations in the State of Washington; that Appellant cannot state a cause of action against this Appellee; that if a cause of action is stated, which is not barred by the statute of limitations, the Second Amended Complaint, as well as those which preceded it, is so verbose, prolix and redundant as to be subject to a Motion to Dismiss for failure to state a claim in simple, concise and direct terminology.

1. The Second Amended Complaint fails to state a cause of action against the Appellee, Continental Casualty Company.

(a) What cause of action is Appellant attempting to plead?

It appears from Paragraphs VI and VII of the Second Amended Complaint (Tr. 370-385) that the theory of Appellant's Second Amended Complaint is the recovery of damages for wrongs done by the named defendants pursuant to a civil conspiracy to injure appellant.

(b) What is a civil conspiracy?

It is the well established rule that the law of Washington controls the decision in this case. *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.ed. 1188. According to the law of the State of Washington, a civil conspiracy is a combination of two or more persons, acting in concert, to accomplish an unlawful purpose or some purpose not in itself unlawful, by unlawful means.

Dart v. McDonald, 107 Wash. 537, 182 Pac. 628;

Eyak River Packing Co. v. Huglen, 143 Wash. 229, 255 Pac. 123;

Kietz v. Gold Point Mines, Inc., 5 Wn.(2d) 224, 105 P.(2d) 71.

The vital elements of a civil conspiracy are:

(1) a preconceived plan to accomplish the purpose,

(2) common design to accomplish the purpose,

(3) a meeting of the minds, or agreement, to accomplish the purpose,

(4) an overt act, pursuant to the plan, to accomplish the purpose,

(5) an unlawful purpose, or the use of unlawful means to accomplish it,

(6) damage resulting from the overt acts of the conspirators.

In *Sobin v. Frederick,* 236 Mich. 501, 211 N.W. 71, we find an example of Element No. 1. In that case, plaintiff, owner of a candy store, gave a mortgage on his candy stock to defendant to secure a sale of candy.

The mortgagee later foreclosed his security. Plaintiff thereafter sued the mortgagee, the sheriff and the buyer at the sale for damages for alleged conspiracy. Said the Court, at page 74:

> "There can be no ex post facto conspiracy to do that which has already been done. The root principle upon which the law of conspiracy rests is a preconceived plan to unlawfuly work some public or private wrong or injury by concerted action, originating in combination, either carried out by joint action, or at least, pursuant to a joint arrangement and understanding."

See also, *Ransom v. Matson Navigation Co.,* 1 F. Supp. 244, 246 (D.C., Wash.); *State of Mo. ex rel and to use of DeVault v. Fidelity and Casualty Co.,* 107 F. (2d) 343, 348.

In *U. S. v. American Column & Lumber Co.,* 263 Fed. 147, 151 (D.C., Tenn.) a prosecution for conspiracy to violate the Anti-Trust Act, the Court made the following comment on Elements No. 2 and No. 3:

> "The first question arising is whether the defendants in associating themselves together under the so-called 'open competition plan,' thereby formed a combination or conspiracy. In other words, was there in the minds of two or more of the defendants a design to accomplish by and through the plan a common purpose? If so, there was a combination or conspiracy since a combination or conspiracy consists only in a mere meeting of the minds of two or more persons to accomplish a common purpose."

To the same effect, see *Mox Inc. v. Woods,* 202 Cal. 676, 262 Pac. 302.

Wells v. Lloyd, 6 Cal. (2d) 70, 56 P.(2d) 517;

Ashby v. Peters, 128 Neb. 338, 258 N.W. 639, 99 A.L.R. 843;

Burton v. Maupin, (Mo. App.) 281 S.W. 83;

Gerdes v. Reynolds, 30 N.Y.S.(2d) 755.

In the last cited case, the Court adds this warning, at page 89,

> "'The mere knowledge, acquiesence, or approval of the act, without cooperation, or agreement to cooperate, is not enough to constitute one a party to the conspiracy. There must be intentional participation in the transaction with a view to the furtherance of the common design and purpose.' 12 C.J. 544."

The Washington cases support the general rule cited above concerning common design and agreement. In *Dart v. McDonald, supra,* plaintiff sued defendant and wife for damages for a conspiracy to sell stock in a land development company. Defendant owned the land which he sold to the corporation for a much larger price than he paid for it. The business failed. Plaintiff was one of the unsuspecting stockholders. Defendant's wife held no stock in the corporation but plaintiff sought to hold her liable. Said the Court at page 540:

> "Before Mrs. McDonald can be held liable it must be shown that she was a party to the conspiracy prior to the time the respondents subscribed for stock. It is unnecessary to cite authorities to the proposition that before a party can be held liable as a conspirator, the evidence must show that such a person entered into an agreement with the other conspirators to accomplish the object of the conspiracy."

See also, *Kietz v. Gold Point Mines, Inc., supra,* and *Dunlap v. Seattle National Bank,* 93 Wash. 568, 161 Pac. 364.

It is true, as stated in *Calcutt v. Gerig,* 271 Fed. 220, 222, (a case cited by Appellant) that

> "It is sufficient if the proof shows such a concert of action in the commission of the unlawful act or such other facts or circumstances from which the natural inference arises that the unlawful overt act was in furtherance of a common design, intention and purpose of the alleged conspirators to commit the same."

Nevertheless,

> "The mere statement that the parties conspired, or that there was a conspiracy is not enough. The stated conclusion must be predicated upon facts or circumstances showing that there was collusion, confederation, cooperation and related acts between the parties to carry out conjointly the unlawful enterprise, each to do necessary acts to effect the joint enterprise." *Ransom v. Matson Navigation Co., supra,* at page 246.

The fourth element is the overt act, without which there can be no conspiracy.

> "The gravamen of a civil action for conspiracy is found in the overt act which results from the conspiracy and culminates in damage to the plaintiff." *Park-in Theatres, Inc. v. Paramount-Richards Theatres,* 90 F. Supp. 727, 729 (D.C., Md.)

See also, *Moffett v. Commerce Trust Co.,* 75 F. Supp. 303 and *Mox Inc. v. Woods, supra.*

In this regard, the case of *Neustadt v. Employers Liability Assurance Corp. Ltd.,* 303 Mass. 303, 21 N.E.

(2d) 538 is worth noting. Plaintiff sought to enjoin three insurance companies from conspiring to take his automobile liability insurance business and in dealing with his customers directly. Demurrers were sustained, the Court saying, at page 540,

> "But the effect of the charge that the defendants conspired together is to fix a joint liability on the defendants. The mere allegation that the defendants conspired with respect to the plaintiff, standing by itself does not constitute ground for civil relief. If there is no tort set out as to a single defendant, the charge of conspiracy adds nothing . . ."

The fifth element is well stated in *Kietz v. Gold Point Mines, Inc., supra,* wherein the Court quoted from 15 C.J.S. Conspiracy, 998, § 3, at page 231 as follows:

> "To constitute a conspiracy the purpose to be effected by it must be unlawful in its nature or in the means to be employed for its accomplishment, and, where the object in view is lawful and no unlawful means are used, there can be no civil action for conspiracy, even though defendants acted with malicious motives."

Commenting on pleadings in a conspiracy action, the same Court said in *Dart v. McDonald, supra,* at page 543,

> "It is true that it is not necessary, in order to establish the fraudulent conspiracy, that it be shown by direct evidence. It may be established by facts and circumstances; but as above stated, these facts and circumstances must be inconsistent with an honest purpose and reasonably consistent only with the intent to defraud . . . ."

The sixth element concerns the damages suffered as

a proximate result of the acts of the conspirators. As was well stated in *Moffett v. Commerce Trust Co., supra,* at page 304,

> ". . . the gist or gravamen of the action is not the conspiracy itself, but the civil wrong done under the conspiracy and which wrong or wrongs resulted in damage to plaintiff."

To the same effect, see *Park-in Theatres, Inc. v. Paramount-Richards Theatres, supra; Mox Inc. v. Woods, supra.*

(c) How to plead a cause of action for damages for conspiracy?

In *Patten v. Dennis,* 134 F.(2d) 137, the Court said that a cause of action does not consist of acts but of the unlawful violation of a right which the facts show. And in *Black & Yates Inc. v. Mahogany Association Inc.,* 129 F.(2d) 227, 231, the Court stated,

> "A general allegation of conspiracy without a statement of the facts is an allegation of a legal conclusion and insufficient of itself to constitute a cause of action. Although detail is unnecessary, the plaintiffs must plead the facts constituting the conspiracy, its object and accomplishment."

(d) Does the Second Amended Complaint state a cause of action against Continental Casualty Co.?

Applying the legal rules stated above to the allegations of the Second Amended Complaint, it readily appears that Appellant has failed to state a cause of action against Continental Casualty Co.

Taking the Second Amended Complaint paragraph

by paragraph, Paragraph I (Tr. 367) refers solely to jurisdiction. Paragraph II (Tr. 368) is a general statement of the relationship between the parties. In this paragraph, Appellant alleges that Continental was in the bonding business, that Clyde Philp was one of its attorneys-in-fact, that Philp was a partner of Goerig, who together were joint venturers with the Macris, that the Macris had a contract on the Roza Irrigation project, that Appellant was a subcontractor on that job, that McKelvy was a member of the firm which acted as general counsel for Continental. Paragraph III (Tr. 369) recites that Continental bonded the Macris on the Roza job and that the bonds were signed by Philp. Paragraph IV (Tr. 369) spells out the joint venture between Philp & Goering and the Macris. Paragraph V (Tr. 370) alleges the date, March 14, 1944, on which Appellant signed the subcontract.

At the end of Paragraph V, it is apparent that Appellant is attempting to tie Continental with the Macris through the person of Clyde Philp, one of its attorneys-in-fact. The pure coincidence of this event is obvious. In addition, it should be noted that Philp's participation could in no way bind Continental to this joint venture, or to the acts of the joint venturers.

A case in point is *Ransom v. Dollar S.S. Line,* 2 F. Supp. 409 (D.C., Wash.) wherein plaintiff sued three steamship lines for damages for conspiracy. From the pleadings, it appeared that plaintiff was on board a Matson vessel headed for Honolulu when she was removed to a Nippon Line vessel and imprisoned there by officers of the Dollar Line. Later she was removed to a Dollar vessel and taken to Seattle where she was

jailed. Demurrers to the complaint were sustained. In the course of his opinion, Judge Neterer said, at page 410:

> "It has been held that a corporation cannot, in contemplation of the common law, be guilty of conspiracy . . . .
>
> "It may not be said that the employees of one company upon a ship may enter into a conspiracy with the employees of another ship or passenger agent of another ship for treatment of a passenger in the custody of the other ship and formulate a conspiracy of their several employers. Conspiracy is not within the scope of their employment . . . . The regular scope of employment is limited to conduct upon the ship and duties fairly incidental, and where it is sought to hold corporations beyond such employment and duties fairly incidental, it must be shown by affirmative acts of the corporation through its properly functioning agency.
>
> "Malice or unlawful or fraudulent act is the gist of the action of conspiracy . . . . Malice may be said to be an intent from which flows any unlawful and injurious act committed without legal justification. It extends to evil designs or a corrupt or wicked motive against someone at the time of the act. And this must come from the corporation."

From this ample quotation, it would appear that the mere fact that Philip, as attorney-in-fact for Continental, signed the Macri performance bonds could in no way commit Continental to any joint venture with the Macris. Thus the allegations which purport to tie Continental to the joint venture are without legal effect.

Paragraph VI (Tr. 370) is the crux of Appellant's

Second Amended Complaint. Appellant commences this Paragraph with the following words:

> "That defendants and each of them wilfully, maliciously and with deliberate intent to injure, damage and defraud the plaintiff in his performance of said subcontract and otherwise did unlawfully and in accordance with a preconceived plan confederate together, combine, conspire and agree to cause plaintiff to become financially bankrupt, to cause plaintiff to lose his said business and its assets, to ruin plaintiff's business and personal reputation and credit. In furtherance of said willful, intentional conspiracy as aforesaid, defendants engaged in a series of tortious acts continuing from the inception of work by the plaintiff under said subcontract dated March 15, 1944, to and including August 18, 1950, said acts consisting in principal part, of the following:"

These words standing alone do not set forth a conspiracy within the meaning of the legal rules already cited. In the first place, this particular set of words is subject to the criticism against legal conclusions stated in *Black & Yates Inc. v. Mahogany Association, Inc., supra.* To correct this obvious defect, Appellant then attempts to set forth a series of overt acts, numbered A through K (Tr. 370-384). Appellant fails however to correct his deficient pleading of a "preconceived plan" and agreement to injure Appellant. Not one fact is alleged in the entire complaint which complies with the rule of *Ransom v. Matson Navigation Co., supra,* which requires the stated conclusion to be predicated on "facts or circumstances showing that there was collusion, confederation, cooperation and related acts between the parties to carry out conjointly

the unlawful enterprise." Every attempt to set forth such facts is merely a statement of the same legal conclusion: "in furtherance of said conspiracy" (Tr. 370, 371, 378, 379, 381, 383 (2)) or words of similar import: "became a co-conspirator" (Tr. 372) "in concert with the other defendants" (Tr. 378). Such conclusions do not comply with the rules cited. Nowhere has Appellant pleaded facts which show a "common design." " a preconceived plan," or "a meeting of the minds, or agreement" to accomplish the alleged purpose. For this reason alone, the Second Amended Complaint does not state facts sufficient to constitute a cause of action against Continental.

From elements No. 4 and No. 5, we know that Appellant must allege overt acts against Appellant which must be torts or which must result in an unlawful purpose. None of the eleven so-called tortious acts related by Appellant are in fact torts. In Paragraph VI-A (Tr. 370) Appellant sets out the Macris' breach of contract on the Roza project. A breach of contract is not a tort. The allegation that the breach by the Macris was participated in by Continental is a nullity as already shown. Since Philp's only contact with Continental was as attorney-in-fact, he could not bind Continental to Macri in such status. In Paragraph VI-B (Tr. 371), Appellant sets out the termination of the joint venture. Surely this is not a tort. In Paragraph VI-C (Tr. 372-375) Appellant relates the employment of the Appellee McKelvy to sue Macri and Continental, the bonding company. This paragraph merely recites the history of dealings between Schaefer and McKelvy and shows no overt act or tort. In Paragraph VI-D (Tr. 375-378), Appellant sets out his grievances against

McKelvy, including his discovery that McKelvy's firm had represented Continental. The wrong alleged here, if any, is again a breach of contract, this time between attorney and client. In Paragraph VI-E (Tr. 378) Appellant relates his hiring of new counsel, and full disclosure of all the facts in the suit against the Macris. No overt acts of any nature are charged. In Paragraph VI-F (Tr. 379), Appellant alleges the suit filed by the Macris in Oregon against Appellant. No reference is made to Continental. This Appellee contends that these facts do not set forth any tort.

In *Puget Sound P. & L. Co. v. Asia,* 2 F.(2d) 491 (D.C., Wash.) plaintiff sought to enjoin the defendants from conspiring to force a breach of contract between the plaintiff and the City of Seattle by a suit against the city. A motion to dismiss was granted. Regarding the suit, the Court said, at page 492,

> "The only act charged against defendant is the bringing of an action in the State Court, a Court of competent jurisdiction. This was lawful. Fancying they had a grievance and claiming a right in themselves, they had a right to sue . . . and having a right to sue the law does not inquire into the motives.
>
> "A court will not presume that a court of competent jurisdiction will permit itself to be made the instrumentality, through which an unlawful purpose may be accomplished."

Further, the law of both Oregon and Washington requires, in order to establish a tort of malicious prosecution, that there be an arrest of the person or seizure of property.

Manhattan Quality Clothes v. Cable, 154 Wash. 654, 283 Pac. 460;

Hoffman v. Kummel, 142 Ore. 397, 20 P.(2d) 393.

No such facts are alleged. Therefore, this paragraph shows no overt act.

In Paragraph VI-G (Tr. 379-381) Appellant sets out the commencement of his suit in Yakima. In this paragraph, he seeks to make something out of the fact that Continental advised his attorney that Philp and Goerig were parties to the contract and hence liable thereunder. Obviously, there would have been no point in notifying Appellant of this fact until suit was instituted. Prior knowledge would not have affected Appellant in any way. Appellant thereafter relates his victory against all the defendants in both his Yakima suit and on the cross-complaint of the Macris which was the foundation of the earlier Oregon suit. No overt acts are here alleged.

In Paragraph VI-H (Tr. 381-383), Appellant notes the progress of his case from the trial court to the Supreme Court of the United States. He seeks to plead overt acts of a tortious nature in applications for new trial, appeal to the Circuit Court of Appeals and *certiorari* to the Supreme Court, in none of which were any of the defendants successful. How the full and complete defense of this suit by Continental could be considered tortious is beyond reason. From Appellant's Exhibit M (Tr. 438-461) attached to the Second Amended Complaint, we can easily discover Judge Driver's feelings about this case which Continental is

accused of defending. Judge Driver who tried the Yakima case, said, "Now, coming to the law applicable to this situation, it is of course difficult . . ." (Tr. 445); ". . . and as I read the cases while there is none that is squarely in point . . ." (Tr. 446); ". . . this is a close case, and the questions are close and in some respects novel ones; and if the Appellate Court should hold . . ." (Tr. 455); "Well, I know it is a close and difficult question . . ." (Tr. 459). These very statements of the trial court show both a justification for defense and an anticipation of appeal. These statements were amplified by Judge Driver at the time of the hearing on the first Amended Complaint when he said: "It was a very complex series of cases . . ." (Tr. 337); "Here's a case that was a very close and difficult one, I think." (Tr. 338); "I thought the chances were not much more than even." (Tr. 338); "I thought it was a hard-fought, close lawsuit in which I might just as well have found against you as for you, it was that close." (Tr. 339). From these statements, we can see no overt act alleged in Paragraph VI-H.

In Paragraph VI-I (Tr. 383) Appellent seeks to make an overt act out of the refusal of Continental to delete words from its release and from the fact that its co-defendants have not paid their judgments to Continental. In fact, the words were deleted. No tort can be deduced from these allegations.

In Paragraph VI-J (Tr. 383-384), Appellant alleges an attempt by McKelvy to collect a bill for services. This is not a tort. In Paragraph VI-K (Tr. 384) Appellant states that he was unable to get his attorney to sue McKelvy. This is not a tort.

The last paragraph (VII) (Tr. 384-385) deals solely with damages, repeating again the legal conclusions regarding conspiracy.

In summary, it appears that none of the eleven alleged tortious acts are, in fact, torts. Hence, in order to state a cause of action, Appellant must show that the purpose itself was unlawful. Here, Appellant fails, because he has not met the requirement of pleading facts which show a "common design," "preconceived plan" or "meeting of the minds." The intent of one of the defendants alone to injure Appellant is not a fact which creates a conspiracy. It requires the cooperation and confederation of two or more of the defendants. Without this, the Appellant has failed to show injury as a result of a conspiracy.

Briefly stated the only overt "acts" alleged are as follows:

(1) breach of contract by Macri (Tr. 370)

(2) breach of attorney-client contract by McKelvy (Tr. 372-378)

(3) Macri suit in Oregon (Tr. 379)

(4) defense of Schaefer suit in Yakima (Tr. 379-381)

(5) appeals by defendants (Tr. 381-383)

The termination of the joint venture (Tr. 371), the hiring of new counsel (Tr. 378), the deletion of certain words from the bonding company release (Tr. 383), the inability of McKelvy to collect his bill for services (Tr. 383-4), and the inability of Schaefer to get Olson to bring this suit (Tr. 384) are certainly not overt acts.

The Second Amended Complaint shows that Appellant recovered damages for the Macri breach of con-

tract (Tr. 380) and against the Macris on their cross-complaint which was the basis of the Oregon suit (Tr. 381). The Complaint also shows that McKelvy did not prevent Appellant from bringing his suit (Tr. 378). The Complaint also shows that Appellant recovered judgment against Continental, and his costs, all of which were paid (Tr. 380, 383).

Thus, it would appear that, in fact, Appellant suffered no damage as a result of any of the five so-called overt acts. His grievance appears to be one which goes to the expense of conducting a law suit. This same observation was made by Judge Driver in the hearing on the first Amended Complaint when he said at page 339 of the Transcript:

> "You got almost a perfect result, and here I find you suing the losers and the attorney for a million dollars. It's a queer situation. I think perhaps you've come to the realization which many litigants don't, that litigation necessarily and unfortunately is expensive, and that it isn't as profitable even for the winner as is sometimes thought."

It goes without citation that only certain costs of waging a law suit are recoverable. Appellant has been paid these taxable costs. Now he seeks to recover from the losers non-taxable costs in the form of damages. Actually his damages consist of attorneys' fees and other non-taxable court costs, loss of time and profit because unable to conduct his business in the usual course while attending and preparing a law suit, and the other necessary expenses in connection therewith. These are not damages which are the proximate result of a conspiracy.

For these reasons, this Appellee contends that no cause of action has been started against Continental Casualty Co.

2. If any cause of action is stated, it is barred by the Statute of Limitation.

Appellant filed his original Complaint on December 1, 1950 (Tr. 12). Service was made on this Appellee some days later. The statutes of limitations of the State of Washington govern the decision herein. *No. Ky. Telephone Co. v. So. Bell Tel. & Tel. Co.,* 1 F. Supp. 576. In Washington, the Statute of Limitations continues to run until the Complaint has been both served and filed. Since there are so few days involved, let us take December 1, 1950, as the cut-off date.

In Washington there are only two possible statutes which are applicable to this case. One is Rem. Rev. Stat. § 159 providing for a three-year limitation on certain actions. The other is Rem. Rev. Stat. § 165 which provides:

> "An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued."

The latter statute applies to conspiracy actions. In *Mitchell v. Greenough,* 100 F.(2d) 184, a case decided on the basis of Washington law, it was agreed by all parties that the two-year statute governed. In support of this case is *State v. Erickson,* 54 Wash. 472, 103 Pac. 796, which was a trial and conviction of the crime of conspiracy to control milk prices. Defendant, during the trial, moved to dismiss the charges on the ground that the conspiracy had ended more than two years

before the information was filed. In response the Court said, at page 477,

> "It is true that a prior and unsuccessful attempt had been made, but the evidence very clearly shows that there was a renewed agreement and organization which was made within one year prior to the filing of the information. This was the one upon which the present charge was based. The information was therefore filed within time."

The next question to determine is when the cause of action for damages for conspiracy accrues. One of the clearest answers to this question is found in *No. Ky. Telephone Co. v. So. Bell Tel. & Tel. Co.,* 73 F.(2d) 333, 335, 97 A.L.R. 133.

> "In the instant case there are no overt acts alleged to have been committed within one year prior to the filing of the action. In *Nolle v. Oyster,* 230 U.S. 165 at page 182, 33 S.Ct. 1043, 57 L.ed. 1439, it was said to be a well-settled rule that no civil action will lie for a conspiracy unless there be an overt act that results in damage to the plaintiff. A necessary corollary to this rule would seem to be that, when there is an overt act, or the last of a contemplated series of overt acts, the cause of action accrues and the statute of limitations begins to run. If this were not true, then it would result that, in every case where damages resulting from a wrongful act are in their nature continuing, there would be no limitation upon the right of action, and the beneficial purpose of the statute to fix a period to the right to sue would be defeated."

On the basis of this authority, it must next be determined whether there was an overt act committed in furtherance of the alleged conspiracy within the pe-

riod of two years from December 1, 1948, to December 1, 1950.

Working backwards in Appellant's Second Amended Complaint, the latest date alleged is October 4, 1950 (Tr. 384) at which time Appellant's attorney, Olson, refused to take the present suit. Olson is not a party to this action, hence his refusal could not be an overt act of these alleged conspirators. The next date is August 18, 1950 (Tr. 383) when Appellant searched Olson's files for correspondence allegedly written by McKelvy advising Olson about the nature of the action to be brought (Tr. 384). If the letters were written, they would not be in aid of an alleged conspiracy, and if they were not written, the failure to do so could not be an overt act by McKelvy since his employment had been terminated October 20, 1945 (Tr. 377), and he would be under no duty to act. The next date alleged is August 16, 1950 (Tr. 383) when McKelvy attempted to collect his bill for services from Appellant. Since McKelvy did not collect his bill on this date, there would seem to be no overt act.

The next date takes us back to November 9, 1949 (Tr. 383) when Continental paid the judgment. Appellant claims an overt act in the refusal of Continental to delete certain words from its release. The fact remains, however, that the words were deleted; so again, no overt act.

There follows a series of dates regarding the appeal from the decision in the Yakima District Court. Since it is not presumed that the Courts were a party to the conspiracy, the dates of decisions will be ignored and

only the dates of acts by the defendants considered. They follow in reverse chronological order:

June 20, 1949—Macri petition for Writ of Certiorari to Supreme Court (Tr. 382);

May 14, 1949—Continental petition for Writ of Certiorari to Supreme Court (Tr. 382);

March 10, 1949—Macri petition for rehearing of Circuit Court Decision (Tr. 382);

March 7, 1949—Continental petition for rehearing of Circuit Court Decision (Tr. 382);

August 18, 1947—Macri notice of appeal (Tr. 381);

July 29, 1947—Philp & Goerig notice of appeal (Tr. 381);

May 20, 1947—Continental notice of appeal (Tr. 381);

May 9, 1947—Continental motion for new trial (Tr. 381).

This series of dates not only takes us beyond the two-year Statute of Limitations, but also beyond the three-year Statute. Since they are all related acts, they shall be discussed together and the importance of argument over the applicable statute of limitations diminishes.

Is it a tortious act to ask for a new trial, appeal from a decision of a trial court, petition for rehearing or seek a Writ of Certiorari in a case that the trial court describes as "close," "difficult," and "complex," and where the chance of victory is "not much more than even," and where the trial court anticipates that an appeal will follow? (See quotations, *supra*.) Certainly it is no tort. While these acts may be overt in the sense

that something was done, there is nothing, inferential or circumstantial, that indicates that these legal steps were taken pursuant to a preconceived plan, common design or agreement of the parties. Hence, this Appellee contends that there were no overt acts in pursuance of a conspiracy which occurred within a period of three years before December 1, 1950, and that for this reason the cause of action is barred by any and all statutes of limitations without regard to whether the three- or two-year statute applies.

There are no dates alleged in the complaint, later than those heretofore mentioned. No further consideration of the pleadings are necessary for this point in the argument.

3. The District Court did not err in dismissing the Second Amended Complaint without leave to amend.

The Second Amended Complaint was dismissed with prejudice and without leave to amend (Tr. 532-534). The dismissal should be affirmed where the averments of the Complaint show that the plaintiff cannot state a cause of action upon which he can recover.

Gromacki v. Armour & Co., 76 F. Supp. 752.

Appellant's original Complaint takes up 9½ pages of the Transcript (Tr. 3-12). Motions to Dismiss were heard before the Hon. Dal M. Lemmon who consumed considerable time in advising Appellant on the proper manner of pleading his cause of action (Tr. 214-262). Appellant's first Amended Complaint takes up 141 pages of the Transcript (Tr. 42-182). In it, Appellant virtually tries his entire case, setting forth almost all

the evidence in his possession. The Motions to Dismiss this Complaint were heard before the Hon. Sam M. Driver who likewise spent considerable time in advising Appellant on the proper facts to plead to make his complaint safe against motions to dismiss (Tr. 279-360). The Second Amended Complaint takes up 17½ pages of the Transcript and has an additional 112 pages of Exhibits (Tr. 386-498). It is virtually the same as the first Amended Complaint except as to form. (See Analysis, Tr. 528-531.) At the time of the hearing of the Motions to Dismiss this Complaint, Appellant also sought to file a paper denominated "Supplemental Complaint" (Tr. 516-518). By stipulation of all parties, the facts raised in this paper were to be considered in passing on the Motions to Dismiss (Tr. 563). The additional facts related therein seek to further prove McKelvy's representation of Continental on other occasions, and seek to add one B. J. Rask as a conspirator. All of the allegations regarding McKelvy and Continental are matters of evidence and are not material facts. The additional party is in no way associated with the other alleged conspirators by any fact or inference except the usual legal conclusion.

Considering the voluminous detail in these three complaints and the "supplemental complaint," all of which was before the Hon. William T. Lindberg in the hearing on the Motion to Dismiss the Second Amended Complaint (Tr. 555-636), and considering further the advice given to Appellant by Judges Lemmon and Driver, it would appear that Appellant has stated all of the facts which may bear on the matter in controversy and that under no possible statement of the facts,

can he allege a cause of action. For this reason, the District Court did not err in its order dismissing with prejudice and without leave to amend. In fact, this order was made final at the request of Appellant, as well as Appellees (Tr. 610).

4. The Second Amended Complaint does not conform to the Rules of Civil Procedure.

Without waiving any of the foregoing grounds for affirmance, but in the event the Court should find that Appellant has stated facts sufficient to state a claim for relief which claim is not barred by the statutes of limitations, then in that event, the Second Amended Complaint should still be dismissed for failure to comply with the Rules of Civil Procedure.

Rule 8 (a) requires a "short and plain statement of the claim." Rule 8 (e) (1) requires that "each averment of a pleading . . . be simple, concise and direct." The objection that a Complaint is verbose, redundant and prolix in violation of this Rule is properly taken by a Motion to Dismiss.

> *Capdeville v. Am. Commercial Alcohol Corp.,* 1 F.R.D. 365;
>
> *Buckley v. Music Corp. of America,* 1 F.R.D. 603.

Appellant's Second Amended Complaint is verbose, redundant and prolix and subject to a Motion to Dismiss. By separating his Exhibits from the main body of the Complaint, Appellant has in no way changed the allegations of the Second Amended Complaint from those of the first Amended Complaint. Judge Driver

dismissed the latter for prolixity (Tr. 365-367). If the Second Amended Complaint is not to be dismissed without leave to amend, then it should still be dismissed for the same reasons as those stated in Judge Driver's opinion.

This Appellee asserts, however, that under no possible state of facts can Appellant state a claim for relief which is not barred by the statutes of limitations and urges an affirmance of the lower court's ruling, dismissing the Second Amended Complaint with prejudice and without leave to amend, in conformance with the decision in *J. W. Terteling & Sons. v. Central Neb. Public Power & Irrigation District,* 8 F.R.D. 210, 212, where the court said:

> "As against a motion to dismiss for want of adequate statement of claim, a plaintiff is entitled to a liberal construction of his complaint, which should be construed in the light most favorable to the claimant with all doubts resolved in his favor. And the Complaint is not to be dismissed upon that ground, unless 'it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts, which could be proved in support of the claim asserted by him'."

See also, *Jefferson Hotel Co. v. Jefferson Standard Life Ins. Co.,* 7 F.R.D. 722 and *Kansas-Neb. Natural Gas Co. v. City of Hastings, Neb.,* 10 F.R.D. 280.

We contend as stated in *J. W. Terteling & Sons v. Central Neb. Public Power & Irrigation District, supra,* that "it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts, which could be proved in support of the claim

asserted by him'' and that if any facts could be proved, they would be barred by the statutes of limitations. In the event this Court finds to the contrary, we contend that the Second Amended Complaint is still subject to a Motion to Dismiss for failure to conform to Rule 8 (a) and 8 (e) (1) and for this reason, the lower court's decision should be affirmed.

Respectfully submitted,

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